# In the Supreme Court of the United States

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No. 91-453

DAVID H. LUCAS,

*Petitioner,*

v.

SOUTH CAROLINA COASTAL COUNCIL,

*Respondent.*

*ON WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT*

**BRIEF FOR UNITED STATES SENATOR STEVE SYMMS, UNITED STATES SENATOR LARRY E. CRAIG, UNITED STATES SENATOR DON NICKLES, AND UNITED STATES SENATOR CONRAD BURNS AS AMICUS CURIAE SUPPORTING PETITIONER**

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## QUESTION PRESENTED

Does a land-use regulation, pursuant to a State's police power, require compensation under the Constitution's Fifth Amendment if it totally eliminates the value of private property?

## INTEREST OF AMICUS CURIAE

*Amici* are sitting United States Senators, duly elected and sworn to represent the citizens and interests of their respective States. As members of the legislative branch of the Federal government, *amici* are acutely interested in matters affecting the Constitutional right to just compensation when private property is taken for a public use.

## SUMMARY OF ARGUMENT

The South Carolina Supreme Court held that Petitioner Lucas is not entitled to just compensation under the United States Constitution even though the South Carolina Beachfront Management Act, as applied, denied Mr. Lucas of all economically viable use of his property. The state supreme court concluded that just compensation was not required on the sole basis that the statute had a valid public purpose.

The court's decision denies Lucas his fundamental right to just compensation. This Court has consistently maintained that private property cannot be taken for a public use, except upon payment of just compensation. The Court's decisions since the adoption of the Constitution confirm that, while States may appropriately regulate and prohibit certain conduct and use of property, just compensation is required when private property is appropriated for a public use.

By effectively creating an exception that would allow the taking of private property without compensation simply because the State acts pursuant to a valid public purpose, the lower court ignored this Court's decisions requiring that a "takings" analysis consider the impact on private property. The appropriate test for a regulatory taking includes not only the element of the public purpose but also the element of the impact on affected property.

## ARGUMENT

### I. Just Compensation Must Be Paid When A Regulation Denies An Owner All Economically Viable Use Of The Property.



#### A. As Found by the Court Below, the Beachfront Management Act Destroyed All Economically Viable Use of the Property.

The South Carolina Supreme Court held that petitioner Lucas was not entitled to just compensation even though South Carolina's Beachfront Management Act of 1988,[1] as applied, denied petitioner all economically viable use of his property.[2] The Court of Common Pleas found that the setback lines drawn by respondent South Carolina Coastal Council ("Council") rendered Lucas' two lots, which were otherwise suitable for single-family residential development, valueless and, therefore, awarded compensation. The Council appealed to the state supreme court, which stated that the issue was "whether governmental regulation of the use of property, in order to prevent serious public harm, amounts to a 'regulatory taking' of property for which compensation must be paid." *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991).

The South Carolina Supreme Court held that there was no regulatory taking, even though it left undisturbed the trial court's finding that the property no longer had economic value. It effectively held that a taking does not occur when a valid regulation serves to prevent serious public harm, relying upon this Court's decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), as well as *Mugler v. Kansas*, 123 U.S. 623 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). Since, in this case Lucas did not challenge the validity of the Act, the court concluded that compensation is not constitutionally required.

This holding is inconsistent with the constitutional guarantee in the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, that private property shall not be taken except for a public use and upon payment of just compensation.

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[1] S.C. Code Ann. § 48-39-10 *et seq.*

[2] *Amicus curiae* do not address the effect of the 1990 amendment to the Beachfront Management Act.

**B. The Just Compensation Clause was Intended to Secure a Fundamental Right.**

The protection from an uncompensated taking of private property is a fundamental right guaranteed by our Constitution. During the framing of the Constitution, the people were deemed to have an inalienable right to property--that is, a natural right to acquire, dispose of and use property.[3] John Locke had explained that the primary function of government is to preserve that inalienable right to property.[4] Writing roughly seventy-five years after Locke, Sir William Blackstone similarly commented that the preservation of vested property rights is the chief end of government; and, when a property right is taken for the public good, it must be accompanied by the payment of compensation.[5]

A student of this period has observed that "[t]he great focus of the Framers was the security of basic rights, property in particular. . . ."[6] Indeed, in Federalist No. 10, James Madison wrote that the protection of "the diversity in the faculties of men, from which the rights of property originate,...is the first object of government."[7] To secure

[3]In *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795), Justice Patterson observed that "it is evident: that the right of acquiring and possessing property and having it protected, is one of the natural inherent and unalienable rights of man." *See generally* Federalist No. 10 (Madison); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 1931 Wisc. L. Rev. 67. *See also* Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. Rev. 273 (1991); Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 Wisc. L. Rev. 1135; Fisher, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 Emory L. J. 65 (1990).

[4]J. Locke, *Two Treatises of Gov't* 323 (Peter Laslett ed. student ed. 1988).

[5]2 W. Blackstone, *Comm. on the Laws of England* 4. When exercising its eminent domain power, Parliament indulgently acts and must provide "a full indemnification and equivalent for the injury thereby sustained." 1 W. Blackstone, *Comm. on the Laws of England* 135.

[6]J. Nedelsky, *Private Property and the Limits of American Constitutionalism* 92 (1990). Madison believed that "[t]he rights of property were based on natural rights." *Id.* at 35.

[7]The Federalist Papers No. 10, at 78 (Madison) (Clinton Rossiter ed., 1961).



this protection, Madison introduced the clause in the Fifth Amendment: "nor shall private property be taken for public use, without just compensation."[8] Not surprisingly, therefore, during the nation's formative years the requirement of just compensation was often justified on the basis of fundamental or natural law.[9]

**C. There is No Historical Basis For an Exception to the Just Compensation Clause.**

Protecting property rights against uncompensated appropriations has remained a dominant theme throughout the development of our constitutional jurisprudence. A prominent legal historian notes that the period from 1789-1910 marks a "broad tendency to stress the stability of property rights in the American Legal Order."[10] Despite Chief Justice Marshall's opinion in *Barron v. The Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), holding that the Fifth Amendment to the United States Constitution did not apply to the States, the Court's decisions prior to the adoption of the

[8]Nedelsky, *supra*, at 29; Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J. 694 (1985).

[9]*E.g.*, *Henry v. Dubuque*, 10 Iowa 540 (1860); *Sinneckson v. Johnson*, 17 N.J.L. 129 (1839); *Gardner v. Village of Newburg*, 2 Johns. Ch. 162 (N.Y. 1816). *See generally* M. Horwitz, *The Transformation of American Law 1780-1860* (1977); Grant, *supra*; Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century*, 1975 Wisc. L. Rev. 1; Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553 (1972).

[10]Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789-1910*, *reprinted in* L. Friedman & H. Scheiber, American Law and the Constitutional Order 132 (1978).

Fourteenth Amendment nevertheless repeatedly confirmed that private property could not be taken without just compensation.[11]

In its first opinion on the eminent domain power,[12] the Court held that a State could exercise this power against a corporate franchise. *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848). In 1795, Vermont had granted the West River Bridge Company the exclusive right to build and operate a toll bridge along the West River. Forty-four years later, the State passed an internal improvement act sanctioning further development along the river, conditioned upon the payment of compensation for the taking of any property (including franchises). The West River Bridge Company challenged the new statute, claiming that the State could not, under the pretext of the eminent domain power, abrogate its contractual obligation with the company by taking its franchise right, even though it afforded compensation. 47 U.S. at 531. The Court upheld the exercise of the power as a necessary incident to sovereignty. In a separate concurrence, Justice Woodbury demonstrated that the weight of authority sanctioned the use of the eminent domain power, but only upon payment of compensation. 47 U.S. at 539-49.

Freedom from uncompensated takings of private property became the subject of extensive litigation during the period of economic

[11]Early decisions concerning the protection of private property focused on the constitutional prohibition against impairing contracts. It is now well accepted that decisions during the Marshall Court protected vested property rights from encroachment. *See Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). *See generally* C.P. Magrath, *Yazoo, Law and Politics in the New Republic: The Case of Fletcher v. Peck* 102 (1966) ("The Court's decision [in *Fletcher v. Peck*] elevated vested property to a position of primacy in the hierarchy of American constitutional values."). Under Chief Justice Taney, the Court continued to protect property interests, but its decisions reflected an expanding concept of property that incorporated economic change. *See Charles River Bridge Co. v. Warren River Bridge Co.*, 36 U.S. (11 Pet.) 420 (1837). *See generally* J.W. Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (1956); S. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (1971).

[12]*But cf. Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357 (1788) (whether compensation required for seizure of flour unreturned during the war).



expansion and increased regulatory activity following the Civil War.[13] State and local exercise of the expanding police power invariably affected private conduct and use of private property. As Justice Holmes would later observe, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

The degree to which government could affect particular conduct and use of property became a principal focus of challenges to the exercise of the police power. Such challenges were based primarily on the newly adopted "due process" clause of the Fourteenth Amendment, which provided that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Court noted that until the Fourteenth Amendment "[i]t has never been seriously contended that such laws raised any question growing out of the Constitution of the United States." *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 132 (1874). The Fourteenth Amendment, however, provided an opportunity for parties to press for further limitations on State action. In particular, the clause became viewed as a potential vehicle for curbing regulation of business activity, under the premise that the protection against deprivation of liberty and property without due process included the right to

[13]The focus quite often was on whether the eminent domain power could be delegated, or whether the power was being used for a private use, or the appropriate mechanism for determining compensation. *See, e.g., Otis Co. v. Ludlow Manufacturing Co.*, 201 U.S. 140 (1906) (upheld mill-dam statute, where compensation provided); *Clark v. Nash*, 198 U.S. 361 (1905) (whether valid condemnation for a public use); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896) (upheld delegation of eminent domain power to irrigation district); *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885) (upheld mill-dam statute); *Cole v. City of La Grange*, 113 U.S. 1 (1885) (statute authorizing compensable taking of private property held not for a public use); *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1879) (reconfirming inherent right of sovereign to exercise eminent domain power); *Mt. Holyoke Company v. Lyman*, 82 U.S. (15 Wall.) 500 (1873) (upheld claim of interference with fishery interest by construction of mill dam); *Kohl v. United States*, 91 U.S. 367 (1876) (upheld the Federal government's exercise of eminent domain power).

continue to engage in any activity lawful when first undertaken.[14]

The post-Civil War "due process" challenges were not based directly upon the Just Compensation Clause. Not until the late 1890s did the Court hold that the requirement of "due process of law" incorporated the concept of "just compensation."[15] *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897); *see also Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 158, 161 (1896) (suggesting that "due process" includes considering whether property taken for a public use). Nevertheless, when resolving due process challenges prior to the incorporation of the Fifth Amendment, the Court often decided whether there was a "deprivation" of any protected "property" interest. As we next show, the Court's decisions defined two general categories of instances where no deprivation of property occurred. First, the Court ruled that damages resulting from regulation, without more, did not constitute a "deprivation" within the meaning of the Fourteenth Amendment. When governmental action neither regulated nor restricted the use of property, no *deprivation* occurred if the value of property was only indirectly and incidentally affected. Second, the Court ruled that property owners did not have any vested *property* interest in any particular continued use of property or in any particular conduct that interfered with the enjoyment of property by others.

### 1. Incidental Pecuniary Losses Did Not Constitute a "Deprivation" of Property.

The Court distinguished between the lawful exercise of the police power causing "incidental" or "consequential" damage and a "taking." Reviewing various earlier cases, the Court noted that they "recogniz[ed] . . . the distinction between an incidental injury to

[14]*See generally* H. Hovenkamp, *Enterprise and American Law 1836-1937* (1991); A. Paul, *Conservative Crisis and the Rule of Law: Attitudes of the Bench and Bar, 1887-1895* (1976); W. Swindler, *Court and Constitution in the 20th Century: The Old Legality 1889-1932* (1969).

[15]The requirement for just compensation was a limitation upon the use of the eminent domain power. *United States v. Jones*, 109 U.S. 513, 518 (1883). *Cf. Noble v. Union River Logging R. Co.*, 147 U.S. 165 (1893) (revocation of vested right-of-way without compensation held void).



rights of private property resulting from the exercise of governmental powers, lawfully and reasonably exerted for the public good, and the *taking*, within the meaning of the Constitution, of private property for public use." *Chicago B. & Q. R. Co. v. Illinois*, 200 U.S. 561, 583 (1906).

The Court held that governmental activity neither directly burdening private property nor regulating its use did not "take" any "property" interest. Landowners, for instance, could not claim any vested right in the continued maintenance of the status quo of surrounding land--*i.e.*, a status quo that, if changed, would diminish a particular landowner's property value. In an opinion written by Justice Brewer, an ardent defender of property rights,[16] the Court noted that the exercise of the police power was not rendered invalid simply because it worked pecuniary injury when the governmental action was unrelated to the use of private property. *L'Hote v. New Orleans*, 177 U.S. 587, 596-99 (1900) (upholding authorization of what otherwise might have been deemed a nuisance at common law). Thus, landowners whose property fronted streets, for example, failed to persuade the Court to hold unconstitutional changes in street grading. *Cf. Marchant v. Pennsylvania Railway Co.*, 153 U.S. 380 (1894); *City of Chicago v. Taylor*, 125 U.S. 161 (1888).[17]

Another common example of incidental damage occurred when governmentally authorized construction along navigable waterways incidentally affected riparian and other landowners. The Court held that the due process clause generally did not bar such an exercise of the police power. *See Manigault v. Springs*, 199 U.S. 473 (1905); *Bedford v. United States*, 192 U.S. 217 (1904); *Scranton v. Wheeler*,

[16]A. Paul, *supra*, at 70.

[17]Earlier decisions rejected landowners' attempts to effectively impose a negative servitude upon surrounding land, by arguing for compensation as a result of incidental activity unrelated to the use of the landowners' property. The Court held that "one cannot build his house on the top of a hill in the midst of a city, and require the grade of the street to conform to his convenience, at the expense of the public." *Smith v. The Corp. of Washington*, 61 U.S. (20 How.) 135, 148 (1858). *See Goszler v. Corp. of Georgetown*, 19 U.S. (6 Wheat.) 593 (1821); *City of Boston v. Lecraw*, 58 U.S. (17 How.) 426 (1855).

179 U.S. 141 (1900); *Eldridge v. Trezevant*, 160 U.S. 452 (1896).[18] The Court reasoned that such damages resulted from the "incidental consequence" of improvements on navigable highways, with the government exercising a dominant and pre-existing servitude, and did not constitute a taking of property. *Gibson v. United States*, 166 U.S. 269, 274-76 (1897) (congressionally authorized construction of dike in the Ohio river).

A good illustration is *Northern Transportation Co. of Ohio v. City of Chicago*, 99 U.S. 635 (1879). There, state-approved construction by the City of Chicago caused the interruption of a company's access to the Chicago river, where it maintained its dock and warehouse. The company brought a nuisance action against the city, claiming that it was entitled to compensation for consequential damages. 99 U.S. at 641. The Court rejected this argument, holding that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision." *Id.* at 642.

Conversely, in *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872), the Court held that a taking occurred when there was a direct and substantial injury to property. There, the operation of a governmentally approved dam flooded certain private property, completely destroying its value. After rejecting statutory defenses and noting that the takings clause of the Fifth Amendment did not apply to the States, the Court examined the Wisconsin Constitution, which contained a just compensation provision similar to the Fifth Amendment; the Court noted that "this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no state is now without it. . . ." 80 U.S. at 177.[19] The Court then rejected the argument that the injury

[18]*Cf. Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497 (1871) (compensation required upon removal of wharf, where no showing by city that wharf a nuisance or obstruction to navigation).

[19]Not until *Murdock v. The City of Memphis*, 87 U.S. (20 Wall.) 590 (1875), did the Court consider its jurisdiction over state law issues.



was consequential, and held that a taking could occur when there is a "serious interruption to the common and necessary use of property. . . ." 80 U.S. at 179. *See also Manigault v. Springs*, 199 U.S. 473, 484-85 (1905) ("where there is a practical destruction or material impairment of the value of plaintiff's lands, there is a taking which demands compensation").

**2. Decisions Upholding the Exercise of the Police Power did not Sanction Uncompensated Takings.**

The decisions upholding police power measures directly affecting private conduct and use of private property cannot be read as permitting the uncompensated taking of private property. In these cases, litigants frequently sought to establish a vested or property right in the status quo, often arguing that they were being deprived of a liberty or property interest when the exercise of the police power restrained their opportunity to engage in a particular conduct or previously allowed use of property.[20] Such arguments prompted the Court to focus on the scope of the police power as well as the nature and use of property, when considering a possible due process violation.[21] No "taking" of "private property" occurred when the exercise of the police power affected a change in the status quo--even though

[20]*See generally* A. Paul, *supra*. Although the majority in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), rejected the argument that a restraint on the exercise of a trade constituted a deprivation of property, Justice Bradley believed otherwise. *Id.* at 127.

[21]The focus on the "use" of property supported the Court's conclusion in *Munn v. Illinois*, 94 U.S. 113 (1877), that businesses affected with the public interest could be regulated, and that such regulation did not deprive a company of property without due process of law. *See generally* Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts, reprinted in* Perspectives in American History 329 (1971). However, such businesses could not be required to transfer their property to private individuals. *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403 (1896).

particular economic interests may have relied on that status quo.[22] It became axiomatic both that the legislature could not contract away the police power, *Boyd v. Alabama*, 94 U.S. 645 (1877) (lottery); *Stone v. Mississippi*, 101 U.S. 814 (1880) (same), and that "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York R. C. Co. v. White*, 243 U.S. 188, 198 (1917). It was in this context that a commentator could confidently assert that "an act which came within the scope of the State police power could not be termed a deprivation of property."[23]

The Court held that States could constitutionally exercise their police power to regulate or prohibit an activity or use of property that interfered with any other persons' equal enjoyment in the use of their property. Such police power measures did not deprive an owner of any vested property interest without due process, because it had become well established that no person has the right to continue using property in such a way as to harm others. In *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129 (1874), for example, the defendant challenged his conviction for selling liquor, arguing that the prohibition on the sale of liquor violated the Fourteenth Amendment. The

[22]In his treatise on constitutional limitations, Thomas Cooley observed that no vested rights exist in the status quo:

> In organized society every man holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws; but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense. (Footnotes omitted).

T. Cooley, *A Treatise on the Constitutional Limitations* 437 (1868).

[23]C. Warren, II *The Supreme Court in United States History* 572 (Rev. ed. 1947).



Court rejected the argument, but in so doing noted that, if the prohibition applied to liquor manufactured prior to the prohibition, then a serious issue would arise as to whether it deprives an owner of property without due process of law. 85 U.S. at 133. Concurring, Justice Bradley emphasized that compensation is required when vested rights are taken away for the public good, but that no such property interest existed in *Bartemeyer*.[24]

Similarly, in *Boston Beer Co. v. Massachusetts*, 97 U.S. 25 (1878), a company authorized to manufacture malt liquor argued that it had acquired such a vested right through its State incorporation, and therefore was free from the exercise of the State's police power. The Court held that liquor prohibition was an appropriate exercise of the police power, which the State cannot divest. 97 U.S. at 33. "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer." *Id.* at 32. The Court added, however, that "[w]e do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation." *Id.*

*Bartemeyer* and *Boston Beer* both confirmed the principle that the police power could be constitutionally exercised to abate conduct and use of property that is noxious and harmful. The Court applied this same principle in *Northwestern Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878), where the police power was exercised to abate a

[24]Justice Bradley explained that the law "was not in this case an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law does not arise." 85 U.S. at 136. Justice Field also concurred, distinguishing *Bartemeyer* from the *Slaughter-House Cases*, where the Court upheld a State grant of a partial monopoly to one company in the slaughtering business, thus excluding others from engaging in the business. *Id.* at 137-38. Justice Field later wrote that the right to acquire, dispose of and use property is an inalienable right, but limited to the extent that such use "will not impair the equal enjoyment by others of their property." *Crowley v. Christensen*, 137 U.S. 86, 90 (1890) (upholding prohibition on the right to sell liquor).

nuisance that had been previously permitted. The State incorporated a fertilizing company to transport, manufacture and convert dead animals and animal matter into fertilizer. Subsequently, the company was given two years to stop transporting matter through Hyde Park. In an action brought against the corporation for refusing to stop its business, the company argued that its charter created a contract (or property) right that could not be impaired unless through condemnation. The Court rejected the company's argument, holding that the activity clearly involved a nuisance and that the police power "rests upon the fundamental principle that everyone shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions." 97 U.S. at 667. And, since the government cannot contractually guarantee freedom from the exercise of the police power, the exercise in this instance was valid.[25]

None of these cases, however, held that the value of existing property could be totally destroyed without the payment of just compensation, nor did the "nuisance" cases relied on by the court below.

### 3. The Court in *Mugler v. Kansas* Did Not Create any Exception to the Just Compensation Requirement.

The court below emphasized *Mugler v. Kansas*, 123 U.S. 623 (1887). But that case was simply another example of the Court's evolving response to the parade of "due process" challenges to the exercise of the States' police power. Sellers and manufacturers of

[25]Subsequent cases upheld the *power* to prohibit or regulate one's ability to engage in activity or conduct deemed injurious to the health and safety of others. *See Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919) (storage of gasoline); *Reinman v. Little Rock*, 237 U.S. 171 (1915) (livery stables); *Gardner v. Michigan*, 199 U.S. 325 (1905) (garbage collection and disposal); *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) (same); *Fischer v. St. Louis*, 194 U.S. 361 (1904) (upheld prohibition on dairy or cow stables to be built or maintained in city without permission); *New York & N. E. R. Co. v. Bristol*, 151 U.S. 556 (1894) (railroad crossing); *Patterson v. Kentucky*, 97 U.S. 501 (1879) (illuminating fluids).



alcoholic beverages challenged Kansas' law prohibiting the manufacture and sale of liquor.[26] The Court had to decide whether the State's police power could be constitutionally exercised in this fashion. Prior decisions had already established that the police power encompassed such regulation.[27] Yet, counsel for the liquor sellers argued, *inter alia*, that the prohibition was an unconstitutional attempt to deprive parties of their right to engage in the continued operation of the brewery. The State replied, *inter alia*, that parties acquire no vested right to engage in a particular business "detrimental to the public health or public morals, because of the absence of any legislation on the subject." *Mugler*, 31 L. Ed. at 207.

The Court held that the Fourteenth Amendment did not restrict the exercise of the State's police power to prohibit the manufacture and sale of liquor. The Court first reviewed prior decisions upholding the State's power to regulate the manufacture and local sale of liquor. It then rejected the argument that the police power could not regulate the right to manufacture liquor for one's own use, concluding that, as in the case of *Munn v. Illinois*, the power to regulate emanates from the power to protect society from the injurious consequences to others from the activity. The Court then explained that State legislatures have the power to determine what activity causes injurious consequences justifying the exercise of the police power, subject to the courts' constitutional responsibility to determine

[26]Kansas charged Mugler with manufacturing and selling liquor without a license in violation of the law, and Mugler challenged his conviction by claiming that he "was denied rights, privileges and immunities guaranteed by the constitution. . ." 123 U.S. at 653. In a separate action, Kansas sought to close down Ziebold & Hagelin's brewery. *Id.* at 654.

[27]*Foster v. Kansas*, 112 U.S. 205 (1884); *Boston Beer Co. v. Massachusetts*, 97 U.S. 25 (1878); *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129 (1874); *License Cases*, 46 U.S. (5 How.) 504 (1847), *overruled by Leisy v. Harden*, 135 U.S. 100 (1890).

whether it is a legitimate exercise of that power.[28] 123 U.S. at 660-62.

The *Mugler* Court, therefore, rejected the parties' specific argument that the prohibition must fail because they had a vested right to continue to engage in the manufacture and sale of liquor.[29] The Court held that the State had not, and could not contract away its police power, nor had it "give[n] any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged." 123 U.S. at 669. In accordance with prior decisions, the Court reaffirmed that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Id.* at 665.

The Court also refuted defendants' reliance on *Pumpelly v. Green Bay Co.* (discussed *supra*), emphasizing that *Mugler* did not involve the State's power of eminent domain; instead, "the question now before us arises under what are, strictly, the police powers of the State. . . [and] the present case must be governed by principles that do not involve the power of eminent domain." 123 U.S. 668. It ruled that a prohibition on use cannot be deemed a deprivation of property simply because it causes pecuniary loss "by reason of their not being

[28]"If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge. . . ." 123 U.S. at 661. Justice Harlan's majority opinion in *Mugler* echoed other opinions by Justice Harlan, in which the Court held that the exercise of the police power had to be reasonably related to a legitimate State objective. *See Hennington v. Georgia*, 163 U.S. 299 (1896); *Brimmer v. Rebman*, 138 U.S. 78 (1891); *Minnesota v. Barber*, 136 U.S. 313 (1890).

[29]The Court summarized the parties' argument as follows:

> it is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose,- the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law.

123 U.S. at 664.



permitted, by a noxious use of their property, to inflict injury upon the community." *Id.* at 669.[30] Lastly, the Court declined to construe the statute as necessarily authorizing the forfeiture of property lawfully in existence prior to the prohibition. *Id.* at 671-72. Thus, *Mugler* does not justify a public interest or nuisance exception permitting an uncompensated regulatory taking of existing property.

### D. A Regulation That Destroys Vested Property Rights Requires Payment of Just Compensation.

In his oft-repeated observation that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," Justice Holmes brought "due process" and "takings" analysis together. *Pennsylvania Coal Co. v Mahon*, 260 U.S. 393, 415 (1922). From that seminal decision evolved the contemporary concept of a regulatory taking. In *Pennsylvania Coal*, plaintiffs sought an injunction against the mining of coal underlying their property.[31] They alleged that the removal of coal would cause the subsidence of their house, contrary to the State law known as the Kohler Act. The trial court refused to issue an injunction, holding instead that the company had the right to remove the coal and that plaintiffs only sought to prevent a private injury. On appeal, the state supreme court held that the Kohler Act was a police measure which did not "contemplate the taking of private property for public use," and it upheld the Act. *Mahon v. Pennsylvania Coal Co.*, 118 A.2d 491 (1922).

This Court reversed. It held that, as applied to Pennsylvania Coal Company's property, the statute destroyed the company's existing contract and property rights. 260 U.S. at 413. The Court then balanced the extent of the taking, which it viewed as "great," against

[30]*See generally* E. Fruend, *Police Power, Public Policy and Constitutional Rights* 568-69 (1904) (explaining *Mugler* and the distinction between indirect pecuniary loss and taking, noting that State cannot compensate for pecuniary losses incurred as result of prohibiting a specific noxious use of property). Justice Harlan, writing the majority opinion in *Mugler*, later wrote in *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. at 235-6, that the "[d]ue protection of the rights of property has been regarded as a vital principle of republican institutions."

[31]Plaintiffs had previously conveyed the subsurface estate to the company.

the public interest, which it viewed as minimal and not involving a common nuisance. *Id.* at 413-14.[32] Thus, the Court concluded that "[i]f we were called upon to deal with the plaintiffs' position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights." *Id.* at 414.[33] In the remainder of the opinion, the Court held that, because the Act went too far and apparently did not secure any "average reciprocity of advantage" (*Id.* at 415),[34] it was an unconstitutional exercise of the police power. However, the Court indicated that the State's exercise of the police power, in these circumstances, would be constitutional if accompanied by just compensation.[35]

The principle of *Pennyslvania Coal v. Mahon* should have been applied by the South Carolina Supreme Court.

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[32]Justice Holmes had earlier indicated that the line between an acceptable police power measure and a taking was a matter of degree. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908); *Rideout v. Knox*, 19 N.E. 390, 392 (Mass. 1889). *See also Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 367 (1922) (constant firing of ammunition over property may effect taking of easement).

[33]The Court distinguished *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), where the Court had upheld a statute requiring the maintenance of pillars while mining to protect the safety of miners. The coal company had argued that the method for determining the appropriate width of the pillar violated due process. *Id.* at 540. A noted scholar has questioned whether this case even presented any serious issue warranting the Court's attention. A. Bickel, B. Schmidt, Jr., *IX History of the Supreme Court of the United States: The Judiciary and Responsible Government: 1910-1921* 306-07 (1984).

[34]A concept similar to "average reciprocity of advantage" had been used in earlier due process cases to justify the imposition of assessments on landowners for such public activities as draining swamps and building roads. *See, e.g., Davidson v. City of New Orleans*, 96 U.S. 97 (1878). Justice Holmes also used the phrase in *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922).

[35]The opinion concludes with the caveat that "we assume that an exigency exists that would warrant the exercise of eminent domain." 260 U.S. at 416.



## II. This Court Has Not Created Any Exception To The Just Compensation Requirement For Regulations That Destroy All Economic Value.

The South Carolina Supreme Court apparently assumed that *Mugler* and *Mahon* represented two distinct approaches to deciding whether there has been a taking of private property for which just compensation is due. The court premised its holding that Lucas was not entitled to compensation on its view that several of this Court's cases, beginning with *Mugler*, create a so-called "nuisance-like" exception to the right to just compensation for regulations that "go too far" under *Mahon*.

As shown above, however, the lower court's assumption misapprehends both *Mugler* and *Mahon*, as well as subsequent cases applying them. This Court's evolving response to challenges to the exercise of the State's police power demonstrates that *Mugler* does not support any modern day exception to the just compensation requirement. *Mugler* reflects the Court's recognition that States can regulate, and even prohibit, activity deemed injurious to the public health and safety. Such State action does not deny due process of law simply because it prevents persons from engaging in a particular activity deemed harmful to others. *Mahon*, on the other hand, establishes that a regulation that restricts the use of property to the extent of destroying its economic value is a taking.

Although this Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), acknowledged certain "nuisance" cases, it has never recognized a "nuisance" or "nuisance-like" exception which would mechanically justify a refusal to pay just compensation for the destruction of all economically viable uses of a property caused by an otherwise valid regulation. Instead, this Court's decisions have from the beginning been essentially "ad hoc" factually oriented inquiries. *Hodel v. Irving*, 480 U.S. 704, 714 (1987) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)); *see also Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Although these decisions are not necessarily reducible

to easy formulas, one statement about them can be made with confidence.

In every case, the Court has weighed not just the governmental or public interest in the regulation, but also the impact of the regulation on the property owner's interests. Nor should this be surprising, since the owner of private property is the intended beneficiary of the Just Compensation Clause. In no case has the Court rested on its analysis of the governmental action and declined to examine, as the court below did here, the property owner's rights.[36]

Indeed, the South Carolina Supreme Court's decision can be fairly read to create a *per se* rule never before applied in "takings" cases: if there is a valid public purpose to the regulatory measure, and if the legislature has taken the trouble to label the object of its regulation a "nuisance," then no compensation is payable even when the property owner's investment-backed expectations are totally frustrated by the loss of all economically viable uses of the property.

This novel interpretation "goes too far." It would change the Just Compensation Clause to read "nor shall private property be taken except for public use," thus eliminating any requirement for compensation. This Court's decisions have emphasized time and again that the question of whether a regulation effects a taking requires a factual inquiry into both the public justification and the impact on private property, one which "necessarily requires a weighing of private and public interests." *See, e.g., Keystone*, 480 U.S. at 492 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980)). In none of the cases since *Mahon* has this Court held otherwise. Indeed, in two of the cases relied on by the lower court, there was no "just compensation" issue even presented or discussed.[37] Nor in the other cases did

[36]Even before the incorporation of the just compensation requirement into the due process clause and before *Mahon*, the Court in *Lawton v. Steele*, 152 U.S. 133 (1894) indicated that forefiture of articles declared to be illegal and a nuisance, such as illegal fishing nets or diseased cattle, might rise to the level of a due process violation if the property being taken was of great value.

[37]*Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).



the Court's analysis *end* with the justification for the regulation; it never held that the regulation justified the uncompensated extinguishment of *all* economic value.

*Hadacheck v. Sebastian*, 239 U.S. 394 (1915), like *Mugler* before it, predates the Court's first acknowledgement in *Pennsylvania Coal Company v. Mahon* of the "regulatory takings" doctrine. *Hadacheck*, like *Mugler*, was merely a due process examination of the *validity* of the challenged regulation, and no more. *Hadacheck* involved a facial challenge to the regulation and there were no findings of fact on the extent to which the property owner's rights or "investment-backed expectations" were extinguished.

In *Hadacheck*, the owner had for many years conducted a perfectly legal brickyard business on a plot which overlay the clay deposits used in manufacturing the bricks. As the city of Los Angeles grew, it annexed the area in which the brickyard was located, which became primarily residential in character. The city then passed an ordinance prohibiting only the operation of the brickyard. The ordinance did not, for example, prohibit the extraction of the clay to be transported elsewhere, or any other business which might be conducted on the site.

The owner was convicted of the misdemeanor of continuing to operate the brickyard, and brought a habeas corpus petition alleging that the statute violated the Due Process Clause. No issue of whether just compensation should be paid was presented to or decided by the Court. Rather, the Court focused on the effect the ordinance had in depriving the owner of its ability to continue conducting the *business* of the brickyard -- just one of the many bundles of rights in the property. The lower court had stated that the regulation was not precluded by the fact that "the value of the investments made in the business ... will be greatly diminished." 239 U.S. at 408. This says nothing, nor would the record or posture of the case support anything further to be said, about the other uses to which the property could be put, or about whether and to what extent "just compensation" was owed to the owner.

*Miller v. Schoene*, 276 U.S. 272 (1928), decided after *Pennsylvania*

*Coal Company v. Mahon*, also presented only the question of whether the exercise of the police power was valid. That case similarly says nothing about whether just compensation was owed. In an effort to preserve the commercially valuable apple crop, the Virginia State Entomologist had directed that cedar trees near apple orchards be destroyed to eliminate the disease the cedar trees were suspected of transmitting. Certain cedar tree owners challenged the validity of the law.

It is noteworthy that the statute provided for payment to the owners for the costs of removal of the trees and also reserved to them ownership of the felled trees. Had a just compensation issue been presented by the case, the only property interest arguably taken would have been the interest present in the trees while they were standing. But that is beside the point; there was no question presented on whether the cedar tree ordinance went "too far" in any sense that would require the payment of just compensation. All that the Court was called upon to decide, and all that it did decide, was whether the statute was a valid exercise of the State's police power.

The facts of *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), are somewhat similar to *Hadacheck*. The town of Hempstead had grown such that residential development and schools surrounded an extensive sand and gravel pit where prior excavations had created a twenty acre lake. What had once been a perfectly legal and unobjectionable activity now had become incompatible with its surroundings. The town enacted a regulatory ordinance which concededly rendered unprofitable the excavation activity, which was concededly the *most*, but far from the *only* profitable use of the property.

Here, the Court did consider the question of whether the regulation required the payment of just compensation, but little analysis was in fact required on the posture of the case. After noting that "[t]here is no set formula to determine where regulation ends and taking begins[,]. . ." *Goldblatt*, 369 U.S. at 594, the Court went on to say that "[h]ow far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining



will reduce the value of the lot in question." *Id.* In other words, the Court properly ruled that the issue of whether a compensable taking had occurred could *not* be decided without evidence and consideration of the private property owner's interest.

The final case relied upon by the lower court is the most recent, *Keystone Bituminous Coal Association v. DeBenedictis, supra*. This case is commonly misinterpreted as giving new life to the possibility of a "nuisance exception." *Keystone* does not, however, sanction the per se rule effectively adopted by the South Carolina Supreme Court in this case. The opinion of the Court in *Keystone* is in fact a classic "weighing of the public and private interests" so characteristic of this Court's takings jurisprudence.

In *Keystone*, Pennsylvania coal operators brought a facial challenge to the validity of a statute which required that certain coal deposits be left in place to prevent subsidence, or settling, of the surface due to mining. The Court's opinion sets out the task before the Court: "[t]he *two* factors that the Court considered relevant [in *Mahon*] have become integral parts of our takings analysis. We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, ...*or* denies an owner economically viable use of his land.'" 480 U.S. at 485 (emphasis added). The opinion then states the essence of its holding: the application of *both* tests, not just one, demonstrates that the facial challenge must fail.

> First, unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare. Second, there is no record in this case to support a finding similar to the one the Court made in *Pennsylvania Coal*, that the Subsidence Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations.

*Keystone*, 480 U.S. at 485.

The Court first determined whether the statute served a legitimate public purpose. It described prior cases as expressing "[t]he Court's hesitance to find a taking when the State *merely* restrains uses of property that are tantamount to public nuisances. . . ." 480 U.S. at 491 (emphasis added). The Court said that its past "hesitance" to find a compensable taking when a State merely prohibits a nuisance was consistent with the notion of "average reciprocity of advantage" noted in *Pennsylvania Coal v. Mahon*. But this did not end the analysis. In a footnote to this discussion, the Court references the other rationale for the "hesitance," namely, the "simple theory" that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, nothing is "taken" when the nuisance is enjoined. *Id.* at 491 n.20. The Court further indicates in this footnote that any "nuisance exception" to the takings guarantee is "not coterminous with the police power itself." *Id.* (quoting *Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting)).[38] Moreover, during the same term, the Court decided two other cases clearly implying that both the element of the public purpose as well as the element of the impact on private property are, as stated in *Keystone, supra*, "integral parts of our takings analysis." *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). The Court's "hesitance" discussion, therefore, does not, as believed by the court below, dispense with any need to weigh the economic impact of the regulation on private property.

[38]In his dissenting opinion in *Keystone*, the Chief Justice elaborated on this language, stating among other things that the exception to the takings guarantee is in fact one based not on nuisance, but one premised on allowing the government to prevent a "'misuse or illegal use. . .'" and is a "narrow" one. *Keystone*, 480 U.S. at 512 (quoting *Penn Central* (Rehnquist, J., dissenting)). In effect, if there is an exception, it is certainly wrong to label it a "nuisance" exception, and it would appear to require considerably more illegality or harm than Lucas' proposed construction of two houses. The dissent further states that "we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation[,]. . ." a fair description of the effect of the Beachfront Management Act on Lucas' property here. *Id.* at 513.



The court below brushed aside this Court's ensuing consideration of the impact on the value of private property in *Keystone*, possibly because the Court concluded its public justification discussion by noting that it "need not rest. . . [its] decision on this factor [the public justification] alone. . . ." *Keystone*, 480 U.S. at 492. The South Carolina Supreme Court apparently read this phrase as a ruling that public justification can alone serve as the sole basis for denying just compensation. Two reasons, however, belie any such reading. First, the quoted language is prefaced by an express acknowledgement that any takings analysis "necessarily requires a weighing of private and public interests." *Id.* Second, it introduces an extensive discussion of how relatively little adverse impact the statute would in fact have on the coal operators' property rights. *Id.* at 493-99. That discussion concludes with an unqualified holding that "it is plain that the petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property." *Id.* at 499.

Of course, if the Court had intended its *Keystone* opinion to signal that it would now recognize a rule not requiring compensation when the government legitimately acts to prevent a harmful use of property, no analysis of the impact on the property owner's rights would have been necessary. The Court's discussion of that impact was not, however, as the court below effectively held, mere dictum. The test for a regulatory taking includes the element of the impact on affected property as well as the public purpose. That is the consistent holding of this Court, *Nollan, supra; Agins, supra; Penn Central, supra*; and nothing in *Keystone* can be read as overriding this settled line of precedent.

## CONCLUSION

The decision of the South Carolina Supreme Court should be reversed, and the case remanded for a consideration of Lucas' claim for just compensation.

Respectfully submitted,

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